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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH CHRISTOPHER CUESTA,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FAILURE OF STATE COURTS TO FULLY CONSIDER THE OPTIONS OF A QUALIFIED "RESTRICTIVE INTERMEDIATE PUNISHMENT" STATUTE IS A DENIAL OF A CRIMINAL DEFENDANT'S PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. WHETHER THE FAILURE OF STATE COURTS TO FULLY CONSIDER THE OPTIONS OF A QUALIFIED "RESTRICTIVE INTERMEDIATE PUNISHMENT" STATUTE CONSTITUTES "CRUEL AND UNUSUAL PUNISHMENT" UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

III. WHETHER THE CONFUSION BETWEEN THE HIGHEST COURTS OF DIFFERENT STATES REGARDING THE FULL CONSIDERATION OF ALL ALTERNATIVE SENTENCING OPTIONS WARRANTS SOME FORM OF FEDERAL INTERVENTION?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

JOSEPH CHRISTOPHER CUESTA

Represented by Jaimee A.M. Dautrich, Esq., Jaimee A.M. Dautrich, P.C., 530 Court Street, Reading, PA 19601

Respondent (appellee below):

COMMONWEALTH OF PENNSYLVANIA

Represented by Berks County District Attorney John T. Adams, Esq., Berks County Services Center, 633 Court Street, 5th Floor, Reading, PA 19601

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The December 24, 2007, *per curiam* opinion of the Supreme Court of the Commonwealth of Pennsylvania, Middle District, is reprinted at App. 1. The August 31, 2007, Memorandum opinion of the Superior Court of Pennsylvania is unreported, and is reprinted at App. 2-7. The December 6, 2006, Memorandum Opinion of the Court of Common Pleas of the County of Berks, Pennsylvania, is also unreported, and is reprinted at App. 8-18.

STATEMENT OF JURISDICTION

The Supreme Court of the Commonwealth of Pennsylvania issued its *per curiam* opinion on December 24, 2007. This Petition for writ of certiorari is timely in that Petitioner has filed it within 90 days of December 24, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 42 Pa.C.S.A. § 9763(e) as applied to the Qualified Restorative Intermediate Punishments (RIP) program of Berks County by Pennsylvania courts. Specifically, 42 Pa.C.S.A. § 9763, which authorizes sentences for conviction under 75 Pa.C.S.A. § 3802, relating to Driving Under the Influence of Alcohol or

Controlled Substances (DUI) is involved in this Petition.

Additionally, in accordance with 37 Pa. Code § 451.52 relating to sentencing restrictions for driving under the influence convictions, RIP programs may be used to satisfy the mandatory minimum sentencing requirements of 75 Pa.C.S.A. § 3802, as follows:

> (A) residential in-patient drug and alcohol programs or residential rehabilitative programs; or
>
> (B) house arrest and electronic monitoring combined with drug and alcohol treatment.

In the instant case, there is no question that Cuesta is a recidivist offender who was eligible for a qualified RIP. As such, the mandatory provisions of DUI were satisfied if Cuesta was sentenced to an intermediate punishment sentence. However, the sentencing court, believing that it lacked authority to consider electronic monitoring, categorically denied Cuesta's request for a sentencing alternative that is specifically allowed under Pennsylvania law.

STATEMENT OF THE CASE

I. Overview of the Case

The Supreme Court of the Commonwealth of Pennsylvania entered a *per curiam* opinion, denying Cuesta's Petition for Allowance of Appeal to said court. Therefore, the Memorandum Opinion of the

Superior Court of August 31, 2007, affirming the judgment of sentence of the trial court of Berks County, is the controlling opinion in this case.

II. Background of the Case

On May 8, 2004, Cuesta's motor vehicle was stopped by a police officer while it was being operated erratically. The officer requested that Cuesta submit to chemical testing. Upon Cuesta doing so, the test resulted in a blood alcohol level in excess of .16%. This incident resulted in the charges filed to Criminal Docket 3768/04, to which Cuesta ultimately entered a guilty plea.

On August 17, 2004, before he was sentenced in case No. 3768/04, Cuesta's motor vehicle was involved in a minor one-vehicle traffic accident. When the police arrived, the officer observed indicia of intoxication and requested that Cuesta submit to chemical testing. Cuesta complied, and the test yielded a result in excess of .16%. This incident resulted in charges filed to Criminal Docket 6116/04, to which Cuesta ultimately entered a guilty plea.

It is undisputed that sometime after these incidents Cuesta entered a thirty-day in-patient residential treatment facility. App. 9. It is also undisputed that Cuesta completed the program successfully, as he would not receive credit for failing to do so. This fact indicates that he was in a qualified RIP, although neither the sentencing court nor the appellate court mentioned this fact.

III. Proceedings Below

On July 26, 2006, Cuesta entered an open plea of guilty in three Driving Under the Influences cases, two of which are contested in this petition. In the uncontested case, Criminal Docket 2192/04, Cuesta pled guilty to Count Two (2) Driving Under the Influence, 75 Pa.C.S.A. § 3802. The Court sentenced him to the mandatory minimum penalty of forty-eight (48) hours to twenty-three (23) months incarceration in Berks County Prison and a three hundred dollar ($300.00) fine.

In Criminal Dockets 3768/04 and 6116/04, Cuesta pled guilty to Count Two (2) Driving Under the Influence, Highest Rate, 75 Pa.C.S.A. § 3802(c). This was Cuesta's second (2nd) Driving Under the Influence offense for sentencing purposes and his third (3rd) lifetime. Cuesta was sentenced to the mandatory minimum of ninety (90) days to five (5) years incarceration in Berks County Prison and a one thousand five hundred dollar ($1,500.00) fine. In addition, Cuesta was to receive credit for thirty days time served in a residential treatment facility. In Criminal Docket 6116/04, Cuesta pled guilty to Count Three (3) Driving Under the Influence, Highest Rate, 75 Pa.C.S.A. § 3802(c), and received a sentence identical to that in Criminal Docket 3768/04. The sentences imposed were to run concurrently. The latter sentence was Cuesta's second (2nd) Driving Under the Influence for sentencing purposes and his fourth (4th) lifetime.

On August 4, 2006, Cuesta's then-counsel filed a Post-Sentence Motion pursuant to Pa.R.Crim.P.

720(B). Cuesta's sole contention was that the Court did not consider all appropriate sentencing options, namely electronic monitoring. Said Post-Sentence Motion was denied on September 18, 2006.

Cuesta then filed a timely appeal to the Superior Court of Pennsylvania. The judgment of the lower court was affirmed on August 31, 2007, by an unpublished non-precedential opinion. Thereafter, Cuesta filed a timely petition for allocatur with the Supreme Court of Pennsylvania, which was denied by a per curiam opinion on December 24, 2007.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that the highest court of a state has failed to address a case that has important federal questions. Another consideration is when the highest court of a state has entered a decision in conflict with the decision of another state court on the same important matter.

Further, it is necessary for this Court to review the act of another branch of government, namely, the state judiciary, to ensure that there is a true assessment of the fairness of a decision in an individual case that involves the impairment of that individual's liberty.

All these considerations are present in this case. This case involves the failure of both the state trial and appellate courts to recognize the importance of reviewing all options available in sentencing a defendant in a diversionary program that is designed to allow courts to substitute treatment in lieu of incarceration.

The legislature of the Commonwealth of Pennsylvania has adopted mandatory sentencing provisions regarding certain crimes and certain offenders. Specifically at issue in the instant case are the mandatories regarding driving under the influence of controlled substances and the sentencing court's categorical refusal to consider Pennsylvania law. This is prejudicial error, entitling the defendant to a new hearing.

Generally, no court has the ability to impose a sentence less than that required by a mandatory minimum provision. However, the development of diversionary programs to ameliorate the punishment imposed by the mandatories is the *du jour* trend taken by the Commission for Sentencing in Pennsylvania (hereinafter Commission). Hence, said Commission has developed "intermediate punishment" programs, which are made available to defendants who would normally be incarcerated.

Arguably, there are many reasons for this trend: the concept of substance abuse as a disease, the amenability of offenders to treatment and rehabilitation as opposed to mere punishment, and the eventual betterment of our entire society as a result of

treating substance abusers. *See also* the Commentary to § 303.12 of the Sentencing Guidelines Implementation Manual.

The fact that such programs are available to certain defendants mandates that a sentencing court review all options available under a qualified restrictive intermediate punishment program at the time of sentencing. Additionally, appellate courts would be required to review whether this was done, not merely whether the sentence was "legal" or within the scope of the discretion of the court, or within the guidelines.

The Court's review is warranted for all of these reasons.

I. Review Is Warranted Because the Supreme Court of the Commonwealth of Pennsylvania Has Failed to Fully Consider the Options of Restrictive Intermediate Punishment Statute Thereby Denying a Criminal Defendant Procedural Due Process Under the Fourteenth Amendment of the United States Constitution, Which Is a Significant Federal Question.

As the Supreme Court of Pennsylvania entered a *per curiam* opinion, the rationale of the Superior Court controls in the instant case. The Superior Court entered a non-precedential decision that framed the issue before it as "the discretionary aspects" of a sentence. In doing so, the Superior Court ruled that Cuesta failed to comply with Pa.R.App.P. 2119(f), as he failed to set forth a concise statement of

the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. This ruling ignores that Cuesta's contention that the trial court failed to consider all the options available to it when imposing its sentence, which is a challenge of the procedural due process applied by the trial court. It was incumbent upon the sentencing court to conduct a hearing that considered all options. In the instant case, the trial failed to properly apply and interpret a statute, resulting in a categorical denial of the option of electronic monitoring, or electronic monitoring with treatment.

A state must give one whom it deprives of his liberty the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Questions of fundamental justice protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 98 A.L.R. 406 (2005). The solicitude for securing justice that is embodied in the Due Process Clause is not satisfied by formal compliance or mere procedural regularity.

Liberty is a fundamental right. The sentencing hearing requires a judge to not merely exercise discretion, but to correctly interpret and apply the law. In the instant case, it is undisputed that the sentencing guidelines clearly were modified by a qualified intermediate program, or Cuesta would not have been given credit for his thirty days of treatment in a residential facility. Obviously, this treatment was considered by the sentencing court and credited

toward the mandatory minimum sentence. App. 9 (Appellant was to receive credit for thirty days time served in a residential treatment facility.)

Given that Berks County had such a program, and that Cuesta obviously was given the benefit of said program, the trial court was required to consider all options at sentencing. The Commonwealth somehow advanced the position that the sentencing court was not legislatively permitted to consider electronic monitoring because Cuesta was ineligible for any intermediate punishment. Clearly, the Commonwealth was wrong, as Cuesta, as stated, was given credit for thirty days of treatment. Therefore, the Petition for Writ of Certiorari should be granted.

II. Review Is Warranted Because the Failure of the Supreme Court of Pennsylvania to Fully Consider the Options of a Restrictive Punishment Statute Constitutes Cruel and Unusual Punishment Under the Eighth Amendment of the United States Constitution, Which Is a Significant Federal Question.

This Court has long held that the Bill of Rights, which includes the Eighth Amendment, is incorporated into the Fourteenth Amendment through the Due Process clause, and therefore is made applicable to the states. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The cruel and unusual punishment provision has been deemed as appropriate to review state action. *Louisiana ex rel. Francis v. Resweber*, 329 U.S.

459 (1947); *Robinson v. California*, 370 U.S. 660 (1962).

The prohibition against cruel and unusual punishment is not limited to capital cases, or claims of institutional aggression or deprivation. The prohibition of cruel and unusual punishment is directed toward the illegal punishment by the government. *See Flemming v. Nestor*, 363 U.S. 603, 613 4 L.Ed. 2d 1435, 80 S.Ct. 1367 (1960) (punishment in the constitutional sense).

In the instant case, the Commission on Sentencing in Pennsylvania has enacted a specific statute that permits the appropriate DUI offender to avoid mandatory incarceration by engaging in residential treatment, or house arrest with electronic monitoring and drug and alcohol treatment. 37 Pa. Code § 451.52. Therefore, it is apparent that the legislature requires all these options to be considered, not merely one. To sentence a defendant to incarceration without considering all options available imposes a cruel and unusual punishment on said defendant.

Therefore, for all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

III. Review Is Also Warranted to Resolve the Confusion Among the Lower Courts Regarding the Full Consideration of all Alternative Sentencing Options.

The reasoning of the Superior Court of Pennsylvania is inapposite to that of the Supreme Court of the State of Washington. In reviewing the sentencing

court's categorical denial of a defendant's request for a Drug Offender Sentencing Alternative (DOSA), the Supreme Court of the State of Washington considered whether the defendant, Grayson, received sufficient consideration of his request for a DOSA. The court noted that while a trial judge may exercise broad discretion, discretion must still be exercised in conformity with state law. *Washington v. Grayson*, 154 Wash.2d 333 (2005). Further, the request must be actually considered by the trial judge, not merely categorically denied by it.

In *Grayson*, the Washington Supreme Court considered the Petition of a drug offender requesting a sentencing alternative under Washington state law. The Court held that a trial court's decision to deny a criminal defendant's request for a sentencing alternative is not reviewable under state law, but that an appellate court may review the procedure employed by the court in denying the request.

Like the qualified RIP in Berks County, DOSA attempts to provide treatment for some offenders judged likely to benefit from it. There can be no question that Cuesta struggles with a substance abuse problem and needs treatment. It is noteworthy that there is no statutory prohibition against a criminal defendant participating in both inpatient treatment and house arrest and electronic monitoring with drug and alcohol treatment to satisfy mandatory minimum sentencing requirements. Nor does the statute require that only part of the mandatory sentencing requirement can be satisfied by treatment alternatives.

This schism between the state courts' decisions warrants the grant of the petition at bar.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

In the instant case, the Pennsylvania legislature has enacted laws to establish and monitor diversionary programs for appropriate offenders. To meaningfully carry out the purposes of such programs, the courts must fully evaluate not just the offender who seeks the benefits of an available program, but all options permitted by the statute. The failure to do so is to violate the constitutional rights of both the Eighth and Fourteenth Amendments.

Further, the state courts in Washington have entered a holding on the same issue raised in the instant case, and that holding conflicts with the one in Cuesta. With Cuesta, the courts of Pennsylvania, unlike the Supreme Court of Washington state, did not fully evaluate Cuesta's appeal. Rather, the *per curiam* opinion of the Pennsylvania Supreme Court merely rubberstamped a denial of his request for meaningful appellate review of the failure of the sentencing judge to consider a statutory sentencing alternative.

Lastly, it is important to note that the benefits of diversionary programs do not enure merely to the

offenders. The economic and human benefits of such programs to an entire community are more likely to be achieved if diversionary programs are fully implemented by the state courts.

Respectfully submitted,

JAIMEE A. M. DAUTRICH

MARCH 24, 2008

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 794 & 795 MAL 2007
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
JOSEPH CHRISTOPHER CUESTA,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 24th day of December, 2007, the Petition for Allowance of Appeal is hereby **DENIED**.

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH CHRISTOPHER CUESTA, Appellant	:	Nos. 1828 & 1829 MDA 2006

Appeal from the Judgment of Sentence entered on July 26, 2006, in the Court of Common Pleas of Berks County, Criminal Division, at No(s). CP-06-CR-0003768-2004, CP-06-CR-0006116-2004.

BEFORE: LALLY-GREEN, DANIELS, and TAMILIA, JJ.

MEMORANDUM: FILED: August 31, 2007

Appellant, Joseph Christopher Cuesta, appeals from the judgment of sentence entered on July 26, 2006. We affirm.

The trial court stated the factual and procedural history as follows:

> On July 26, 2006, this Court accepted Joseph Christopher Cuesta's, (hereinafter Appellant) open plea of guilty in three Driving Under the Influence [DUI] cases, two of which are contested in this appeal. In the uncontested case, Criminal Docket 2192/04,

Appellant pled guilty to Count Two (2) Driving Under the Influence. This Court sentenced Appellant to the mandatory minimum penalty of forty-eight (48) hours to twenty-three (23) months incarceration in Berks County Prison and a three hundred dollar ($300.00) fine. In the first of the above captioned cases, Criminal Docket 3768/04, Appellant pled guilty to Count Two (2) Driving Under the Influence, Highest Rate. This was Appellant's second (2nd) Driving Under the Influence offense for sentencing purposes and his third (3rd) lifetime. Appellant was sentenced to the mandatory minimum ninety (90) days to five (5) years incarceration in Berks County Prison and a one thousand five hundred dollar ($1500.00) fine. In addition Appellant was to receive credit for thirty days time served in a residential treatment facility. Finally, in Criminal Docket 6116/04, Appellant pled guilty to Count Three (3) Driving Under the Influence, Highest Rate. This was Appellant's second (2nd) Driving Under the Influence offense for sentencing purposes and his fourth (4th) lifetime. Appellant was sentenced to the mandatory minimum ninety (90) days to five (5) years incarceration in Berks County Prison and a one thousand five hundred dollar ($1500.00) fine. In addition Appellant was to receive credit for thirty days time served in a residential treatment facility.

On August 4, 2006, Appellant by and through his counsel, Michael J. Cammarano, Esquire, filed a Post-Sentence Motion. . . .

> Said Post-Sentence Motion was denied on September 18, 2006.
>
> On October 17, 2006, Appellant filed a Notice of Appeal to the Superior Court of Pennsylvania. On October 25, 2006, this Court Ordered the Appellant to file a Concise Statement of Matters Complained of On Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925. On October 30, 2006, Appellant filed his Concise Statement.

Trial Court Opinion, 12/6/06, at 1-2 (footnotes omitted).

> Appellant raises the following Issue on appeal:
>
> Whether the court is required to consider and has the authority to impose a sentence of electronic monitoring for a second offense of driving under the influence?

Appellant's Brief at 2.

Since Appellant challenges the discretionary aspects of his sentence, this Court is to address some preliminary questions.[1]

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[1] Appellant claims that he is challenging the legality of his sentence. Appellant contends that his sentence is Illegal because the sentencing judge erroneously thought that he could not, by law, impose home electronic monitoring. As recently stated by this Court, *en banc*, Appellant's claim is one addressed to the discretionary aspects of sentencing. ***See Commonwealth v. Robinson***, 2007 PA Super. 230 (the term "illegal sentence" is a term of art that implicates the fundamental legal authority of the court to impose the sentence that it did and is applied

(Continued on following page)

Before we reach the merits of a challenge to the discretionary aspects of a sentence, we must determine: "(1) whether appellant has filed a timely notice of appeal, ***see*** Pa. R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa. R. Crim. P. [720]; (3) whether appellant's brief has a fatal defect, Pa. R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa. C.S.A. § 9781(b)." ***Commonwealth v. Petacclo,*** 2000 PA Super 384, 764 A.2d 582, 586 (Pa. Super. 2000). An appellant

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narrowly, to a relatively small class of cases, including: (1) claims that the sentence fell "outside of the legal parameters prescribed by the applicable statute"; (2) claims involving merger/double jeopardy; and (3) claims implicating the rule in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000)).

Here, Appellant's claim challenges the discretionary aspects because Appellant does not challenge the fundamental legal authority of the court to impose the sentence. Additionally, we note that even if this were a legality of sentence claim, our decision in ***Commonwealth v. Poncula,*** 915 A.2d 97 (Pa. Super. 2006), controls. In ***Poncala,*** we held that the penalty provisions of the DUI statute are mandatory and specific for DUI offenses and trump the general and discretionary sentencing provision allowing for intermediate punishment programs, such as electronic monitoring. ***Id.*** at 105. Appellant concedes that ***Poncala*** controls here but asserts that we should reconsider the decision. Appellant's Brief at 7. ***Poncala*** is binding decisional law and we are constrained to follow it. Finally, we observe that the record reflects that the sentencing court imposed a lenient, 90-day minimum sentence here, treating Appellant's third and fourth DUI violations as second violations.

> who falls to raise an objection to the discretionary aspects of his sentence at the sentencing or in a post-sentence motion waives the objection. ***Id.***

Commonwealth v. Dodge, 859 A.2d 771, 775 (Pa. Super. 2004), *appeal denied,* 880 A.2d 1236 (Pa. 2005).

As stated above, compliance with Pa.R.A.P. 2119(f) is to be ascertained. Pa.R.A.P. 2119(f) provides:

> [a]n appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Pa.R.A.P. 2119(f). "A failure to include the Rule 2119(f) statement does not automatically waive an appellant's argument; however, we are precluded from reaching the merits of the claim when the Commonwealth lodges an objection to the omission of the statement." ***Commonwealth v. Roser,*** 914 A.2d 447, 457 (Pa. Super. 2006), *appeal denied,* 2007 Pa. LEXIS 1404 (Pa. July 9, 2007).

Herein, the record reflects that the Commonwealth objected to Appellant's failure to include a Rule 2119(f) statement in his brief. Commonwealth

Brief at 1, 3, 5. Accordingly, Appellant's sentencing issue is deemed waived.[2] ***Roser***.

Judgment of sentence affirmed.

Judgment Entered:

/s/ James D. McCullough
Deputy Prothonotary

Date: August 31, 2007

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[2] We also note that Appellant failed to include notes of testimony from the July 26, 2006 sentencing hearing in the certified record on appeal. We have held that we cannot meaningfully review claims raised on appeal unless we are provided with a full and complete certified record. ***Commonwealth v. Preston,*** 904 A.2d 1, 6 (Pa. Super. 2006) (*en banc*), *appeal denied,* 916 A.2d 632 (Pa. 2007). A claim that cannot be resolved in the absence of transcripts must be deemed waived. ***Id.*** at 7. Thus, Appellant's claim could be deemed waived on this basis as well.

COMMONWEALTH OF PENNSYLVANIA,	**: IN THE COURT OF : COMMON PLEAS OF : BERKS COUNTY, : PENNSYLVANIA : CRIMINAL DIVISION**
vs.	
JOSEPH CHRISTOPHER CUESTA,	**: No. 3768/04 & 6116/04 : BOCCABELLA, JUDGE**

Matthew G. Eltringham, Esquire,
Assistant District Attorney for the Commonwealth

Alisa R. Hobart, Esquire,
Assistant District Attorney for the Commonwealth
On Appeal

Michael J. Cammarano, Esquire,
Attorney for the Defendant

Memorandum Opinion,
John A. Boccabella, J. December 6, 2006

On July 26, 2006, this Court accepted Joseph Christopher Cuesta's (hereinafter Appellant) open plea of guilty in three Driving Under the Influence cases, two of which are contested in this appeal. In the uncontested case, Criminal Docket 2192/04, Appellant pled guilty to Count Two (2) Driving Under the Influence.[1] This Court sentenced Appellant to the mandatory minimum penalty of forty-eight (48) hours to twenty-three (23) months incarceration in Berks County Prison and a three hundred dollar ($300.00)

[1] 75 Pa.C.S.A. 3731(a)(4)(i).

fine. In the first of the above captioned cases, Criminal Docket 3768/04, Appellant pled guilty to Count Two (2) Driving Under the Influence, Highest Rate[2]. This was Appellant's second (2nd) Driving Under the Influence offense for sentencing purposes and his third (3rd) lifetime. Appellant was sentenced to the mandatory minimum ninety (90) days to five (5) years incarceration in Berks County Prison and a one thousand five hundred dollar ($1500.00) fine. In addition Appellant was to receive credit for thirty days time served in a residential treatment facility. Finally, in Criminal Docket 6116/04, Appellant pled guilty to Count Three (3) Driving Under the Influence, Highest Rate[3]. This was Appellant's second (2nd) Driving Under the Influence offenses for sentencing purposes and his fourth (4th) lifetime. Appellant was sentenced to the mandatory minimum ninety (90) days to five (5) years incarceration in Berks County Prison and a one thousand five hundred dollar ($1500.00) fine. In addition Appellant was to receive credit for thirty days time served in a residential treatment facility.

On August 4, 2006, Appellant by and through his counsel, Michael J. Cammarano, Esquire, filed a Post-Sentence Motion. Whereby Appellant contested this Court did not consider all appropriate sentencing

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[2] 75 Pa.C.S.A. 3802(c).

[3] 75 Pa.C.S.A. 3802(c).

options, namely electronic monitoring. Said Post-Sentence Motion was denied on September 18, 2006.

On October 17, 2006, Appellant filed a Notice of Appeal to the Superior Court of Pennsylvania. On October 25, 2006, this Court Ordered the Appellant to file a Concise Statement of Matters Complained of On Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925. On October 30, 2006, Appellant filed his Concise Statement. The sole issue set forth for review is:

> The Sentencing Judge believed himself to lack the authority to impose a sentence of electronic monitoring, and therefore failed to consider electronic monitoring as a sentencing alternative.

In both docket numbers, Appellant was sentenced pursuant to 75 Pa.C.S.A. § 3804(c), which provides the penalties for Driving Under the Influence, Highest Rate. Specifically, for a second time offender 3804(c) requires a mandatory minimum ninety (90) days imprisonment and a fine of one thousand five hundred dollars ($1500.00).

The appellant has no absolute right to appellate review of his sentence. 42 Pa.C.S.A. §9781; *Commonwealth v. Mouzon*, 571 Pa. 419, 812 A.2d 617 (2002). Rather, the appellant may have his sentence reviewed on appeal only if the Superior Court determines that "there is a substantial question that his sentence is not appropriate under the sentencing code," *Commonwealth v. Bromley*, 862 A.2d 598, 604

(Pa.Super.2004); *Mouzon,* 812 A.2d at 627. "A bald claim of excessiveness of sentence does not raise a substantial question so as to permit review where the sentence is within the statutory limits." *Commonwealth v. Petaccio,* 764 A.2d 582, 587 (Pa.Super.2000). For a substantial question to exist, Appellant must state reasons that create doubt that this Court sentenced Appellant without appropriately considering the sentencing guidelines or the norms underlying the sentencing process. *Mouzon,* 812 A.2d at 627; *See also Commonwealth v. Koehler,* 558 Pa. 334, 737 A.2d 225 (1999).

In reviewing the discretionary aspects of a sentence on appeal, the Appellate Court shall affirm the Trial Court's sentence unless it finds: (1) that the guidelines were erroneously applied; (2) that the sentence, even though within the guidelines, is "clearly unreasonable"; or (3) that the sentence, if outside the guidelines, is "unreasonable." In any one of these three circumstances, the Appellate Court is required to vacate the trial court's sentence and remand the case with instructions. 42 Pa.C.S.A. § 9781(c). In determining whether a particular sentence is clearly unreasonable or unreasonable, the appellate court must consider the defendant's background and characteristics as well as the particular circumstances of the offense involved, the trial court's opportunity to observe the defendant, the presentence investigation report, if any, the Sentencing Guidelines as promulgated by the Sentencing Commission, and the findings upon which the trial court based its

sentence. *Commonwealth v. Dodge,* 859 A.2d 771, 778 (Pa.Super.2004).

Here, this Court concludes that there is no substantial question about the appropriateness of appellant's sentence because this Court fully complied with the sentencing guidelines and the rationale underlying them.

However, even assuming, *arguendo,* that a substantial question has been raised, the judgment of sentence should still be affirmed because this Court did not abuse its discretion where the Appellant was not eligible for Intermediate Punishment and was previously denied admittance into the Berks County Intermediate Punishment Program.

A sentence will not be overturned unless the record shows a manifest abuse of discretion, which is more than mere error in judgment. *Commonwealth v. Redman,* 864 A.2d 566, 569 (Pa.Super.2004), quoting *Commonwealth v. Cunningham,* 805 A.2d 566 (Pa.Super.2002). A manifest abuse of discretion may be found only where the record establishes that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Rodda,* 723 A.2d 212, 214 (Pa.Super.1999). The decision of the sentencing judge should be given great deference since he is in the best position to view and evaluate the defendant. *See Commonwealth v. Jones,* 640 A.2d 914, 916 (Pa.Super.1994). In arriving at his decision,

the sentencing judge must consider the defendant's age, his prior record, his personal background and characteristics, and his potential to fully rehabilitate. *See Commonwealth v. Martin,* 466 Pa. 118, 351 A.2d 650, 655 (1976).

Here, Appellant was sentenced to the mandatory minimum penalty contained in 75 Pa.C.S.A. 3804(c), Highest Rate, for a second time offender. The sentencing Court determined that due to Appellant's personal circumstances and initiative in seeking treatment his sentences should run concurrently. Additionally, granted Appellant credit for thirty (30) days he spent in a residential treatment facility. As such, this Court did not abuse its discretion when it sentenced the Appellant to the mandatory minimum ninety (90) days imprisonment.

In Pennsylvania, where a mandatory minimum sentence has been provided a court does not have discretion in sentencing, with regard to the minimum sentence, unless specifically authorized under 42 Pa.C.S.A. 9763. *Commonwealth v. Koskey,* 571 Pa. 241, 812 A.2d 509, 511 (2002) citing 42 Pa.C.S.A. § 9721(a.1). Section 9763 relates to sentences involving county intermediate punishment. 9763(c), which imposes restrictions on county intermediate punishment programs, provides in relevant part:

> (1) Any person receiving a penalty imposed pursuant to 75 Pa.C.S.A. §1543(b) (relating to driving while operating privilege is suspended or revoked), former 75 Pa.C.S.A, §3731 (relating to driving under the influence

> of alcohol or a controlled substance) or 75 Pa.C.S.A. §3802 (relating to penalties) for a first, second or third offense under 75 Pa.C.S. [sic] (relating to driving after imbibing alcohol or utilizing drugs) may only be sentenced to county intermediate punishment after undergoing an assessment under 75 Pa.C.S. [sic] § 3814 (relating to drug and alcohol assessments).

42 Pa.C.S.A. §9763. Section 9763 is to be read in conjunction with 42 Pa.C.S.A. Chapter 98, known as the County Intermediate Punishment Act. 42 Pa.C.S.A. 9802 defines the terms used in the County Intermediate Punishment Act. An eligible offender is defined as:

> a person convicted of an offense who would otherwise be sentenced to a county correctional facility, who does not demonstrate a present or past pattern of violent behavior who would otherwise be sentenced to partial confinement pursuant to section 9724 (relating to partial confinement) or total confinement pursuant to section 9725 (relating to total confinement). The term does not include an offender with a current conviction or a prior conviction within the past ten years for any of the following offenses: . . .

42 Pa.C.S.A. 9802. 42 Pa.C.S.A. 9804(b) controls eligibility for intermediate punishment. Most specifically, 9804(b)(5) states:

> A defendant subject to 75 Pa.C.S.A. 3804 (relating to penalties) may only be sentenced to

> county intermediate punishment for a first, second, or third offense under 75 Pa.C.S. [sic] Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).

42 Pa.C.S.A. 9804. In Pennsylvania statutory construction requires that words be given their regular meaning unless restricted by preceding words. 1 Pa.C.S.A. 1903(b). In light of the lack of specific language directing a time limit on the look back period, as opposed to the language found in the definition of "eligible offender," 9804(b)(5) should be construed as containing no time limit on offenses to be considered. Therefore, a person subject to mandatory sentencing for a Driving Under the Influence offense is eligible for county intermediate punishment only on a first, second or third offense regardless of the date of the prior offenses.

Appellant was sentenced on three (3) separate Driving Under the Influence incidents on July 26, 2006. On criminal docket 2192/04 the conviction was Appellant's first (1st) for sentencing purposes and second (2nd) overall. On criminal docket 3768/04 the conviction was Appellant's second (2nd) for sentencing purposes and third (3rd) overall. On criminal docket 6116/04 the conviction was Appellant's second (2nd) for sentencing purposes and fourth (4th) overall. Based upon the plain language of the above quoted section 9804(b)(5) Appellant is not eligible for Intermediate Punishment as this is his fourth offense and not a first, second or third offense.

Even if the Appellant was eligible for an intermediate punishment sentence this Court was prevented from imposing such a sentence by the coordinate jurisdiction rule.

The coordinate jurisdiction rule states that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. *Riccio v. American Republic Ins. Co.,* 550 Pa. 254, 705, A.2d 422, 425 (1997) (citing *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995)). An exception is where motions differ in kind. In such a case, "a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. *Id.* Departure from the coordinate jurisdiction rule is allowed only in exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed. *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326, 1332 (1995). The coordinate jurisdiction rule serves not only to promote the goal of judicial economy but also (1) to protect the settled expectations of the parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end. *Id.* at 1331.

On January 3, 2005, in the above captioned cases, Appellant applied for Treatment Court consideration, which upon completion would result in an intermediate punishment sentence. Appellant's Treatment Court application was reviewed by the Honorable Judge Peter W. Schmehl. The ultimate decision on admittance to Treatment Court and an eventual intermediate punishment sentence rests with the Honorable Judge Schmehl. On February 1, 2005, Appellant was denied admittance to Treatment Court. The Order denying admittance stated the reason for denial was that "the [Appellant] was not an appropriate candidate for the treatment court program." Based on Appellant's rejection from treatment court the above captioned cases remained in this Court for ultimate disposition without the potential for an intermediate punishment sentence as Appellant did not complete the treatment court process.

The coordinate jurisdiction rule prevented this Court from overruling the Honorable Judge Schmehl's determination that Appellant was not an "appropriate candidate for the treatment court program." Due to the fact that Appellant was determined ineligible for treatment court by the Honorable Judge Schmehl this Court did not have the authority to sentence Appellant to an intermediate punishment sentence.

Due to the fact Appellant is a four time driving under the influence offender and was determined ineligible for treatment court and an intermediate

punishment sentence by the Honorable Peter W. Schmehl this court did not possess the authority to sentence Appellant to an intermediate punishment sentence.

For the foregoing reasons this Court respectfully requests Appellant's appeal be denied.